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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	3:73-CV-00127-MDD-WGC **THE UNITED STATES' AND WALKER RIVER PAIUTE TRIBE'S JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Pursuant to Federal Rule of Civil Procedure 56, D. Nev. R-Civ. 56-1, and the *Order Regarding Discovery and Motion Schedule and Procedure* (ECF No. 2611), the Walker River Paiute Tribe ("Tribe") and United States of America ("United States") (collectively "Plaintiffs") jointly move for partial summary judgment on four affirmative defenses presented by Principal Defendants. In Attachment A, attached hereto, the United States and Tribe have identified the four affirmative defenses subject to this motion in each of the Principal Defendants' Answers. As shown in the memorandum of points and authorities below, there is no genuine issue as to any material fact and the United States and Tribe are entitled to judgment as a matter of law denying these defenses.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The United States initiated this action in 1924 to protect the Tribe's right to the uninterrupted surface flow of the Walker River from appropriation by upstream water users. The United States and Tribe now seek three types of water rights for the Walker River Indian Reservation ("Reservation") that have not previously been litigated or put at issue in this action: (1) a storage water right associated with Weber Reservoir; (2) a groundwater right associated with lands added to the Reservation by executive and congressional action in 1918, 1928, 1936, and 1972;[1] and (3) a groundwater right underlying all lands within the exterior boundaries of the Reservation, some of which have been held in trust by the United States for the Tribe since 1859. *The United States'*

[1] The Tribe separately claims a water right to surface waters found on those lands reserved in 1928, 1936, and 1972.

Detailed Statement of Water Right Claims on Behalf of the Walker River Paiute Indian Tribe at 13 (May 3, 2019) (ECF No. 2476); *Amended Counterclaim of the United States of America for Water Rights Asserted on Behalf of the Walker River Paiute Indian Tribe* at 4–6 (May 3, 2019) ("US Amended Counterclaim") (ECF No. 2477-1); *Second Amended Counterclaim of the Walker River Paiute Tribe* at 6–7 (May 3, 2019) ("Tribe Amended Counterclaim") (ECF No. 2479).

Principal Defendants have sought to delay or block litigation of these rights at every turn by drawing out service of process over nearly two decades and asserting legally inapplicable affirmative defenses. In 2019, Principal Defendants again asserted a host of affirmative defenses in their answers to the United States' and Tribe's counterclaims that are plainly irrelevant as a matter of law. *E.g., Walker River Irrigation District's Answer to Second Amended Counterclaim of the Walker River Paiute Tribe* (Aug. 1, 2019) (ECF No. 2523) ("Sample WRID Answer").[2] In order to move this litigation forward, the United States and Tribe have thus far sought, and this Court has granted, dismissal of five of these affirmative defenses: (1) laches; (2) estoppel/waiver; (3) claim and issue preclusion; (4) that the *Winters* Doctrine does not apply to groundwater; and (5) that the United States had no authority to reserve water after Nevada statehood. *Order* at 10–11 (July 20, 2020) ("MJOP Order") (ECF No. 2626).

The United States and Tribe continue this effort to clear away additional

[2] Because Principal Defendants asserted similar affirmative defenses in response to the US Amended Counterclaim and the Tribe Amended Counterclaim, we herein refer to the Sample WRID Answer as demonstrative of the affirmative defenses asserted by most and sometimes all Principal Defendants.

unnecessary and repetitive affirmative defenses asserted by Principal Defendants. This motion seeks partial summary judgment on the following asserted affirmative defenses: (1) finality and repose; (2) that the Tribe cannot have a groundwater right in addition to a surface water right; (3) that the Act of June 22, 1936, precludes additional federal reserved water rights; and (4) that a federal reserved right for the lands added to the reservation after 1924 does not exist if the purpose of those lands can be satisfied with the Tribe's surface water right to 26.25 cubic-feet per second ("cfs") that was previously decreed for other Reservation lands. The United States and Tribe have identified in Attachment A the four affirmative defenses asserted in Principal Defendants' Answers that are the subject of this motion and on which judgment should be entered now in Plaintiffs' favor.

II. APPLICABLE LEGAL STANDARD

A plaintiff may move for summary judgment on an affirmative defense, with the motion examined under traditional summary judgment analysis. Fed. R. Civ. P. 56(a), (c); *Geurin v. Winston Indus., Inc.*, 316 F.3d 879 (9th Cir. 2002). Summary judgment is appropriate if "the Court is satisfied 'that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (quoting FED. APP. R. CIV. P. 56(c)). A dispute of fact is "genuine" if a reasonable factfinder could find for the nonmoving party and is "material" if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). "The amount of evidence necessary to raise a genuine issue of material fact is enough 'to require a jury or judge

to resolve the parties' differing versions of the truth at trial." *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 288–89 (1968)).

In evaluating a summary judgment motion, a court views all facts and draws all inferences in the light most favorable to the nonmoving parties. *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). The moving parties bear the burden of showing that no genuine issues of material fact exist. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). If the moving parties satisfy their burden, the burden shifts to the nonmoving parties to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. The nonmoving parties "may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists," *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and "'must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 783 (9th Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The mere existence of a scintilla of evidence supporting the nonmoving parties' position is insufficient to avoid summary judgment. *Anderson*, 477 U.S. at 252.

III. BACKGROUND[3]

A. The history of the Walker River Indian Reservation boundaries.

The United States reserved a portion of the Tribe's aboriginal territory as the Walker River Indian Reservation on November 29, 1859. *United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 338 (9th Cir. 1939) ("*Walker III*"); *N. Paiute Nation v. United States*, 8 Cl. Ct. 470, 472 (1985)). The original reservation encompassed about 320,000 acres. *N. Northern Paiute Nation*, 8 Cl. Ct. at 472.

In 1902, Congress enacted legislation to allot the irrigable lands within the Reservation to tribal members, set apart "a sufficient amount of non-irrigable rangeland" for use in common by the Indians, and open the remaining lands to non-Indian settlement. Act of May 27, 1902, 32 Stat. 245, 260–61. In 1906, pursuant to the Act of 1902, the United States reduced the Reservation to approximately 51,000 acres, including 10,000 acres allotted to tribal members (the estimated irrigable acreage on the Reservation at that time), and opened lands not allotted or reserved to purchase by non-Indian settlers. 59 Proclamation, September 26, 1906, 34 Stat. 3237. In the decades that followed, few, if any, of the lands opened for non-Indian settlement were claimed or settled by non-Indians. The United States subsequently withdrew substantial amounts of these opened or "surplus" lands, returning them to the Reservation throughout the 20th

[3] This section presents both material and contextual facts related to this motion in order to provide a single, complete recounting of the prior proceedings. For the purposes of this motion, filed pursuant to Fed. R. Civ. P. 56 and D. Nev. R-Civ. 56-1, those facts that are undisputed and material to the resolution of this motion have been identified in the United States' and Tribe's concise statement of undisputed material facts, attached as Attachment B.

century.

Beginning in 1918, President Wilson reserved approximately 34,000 acres of additional public lands for the Tribe, increasing the area of the Reservation to about 86,000 acres. Exec. Order No. 2820 (Mar. 15, 1918) (hereafter, "1918 Lands").

In 1924, President Coolidge temporarily withdrew nearly 69,000 acres of additional public lands as part of the Reservation for approximately one year. Exec. Order No. 4041 (June 27, 1924). The temporary withdrawal was extended until March 5, 1927, upon which date the lands would be subject to disposal. Exec. Order No. 4177 (Mar. 18, 1925). On March 3, 1928, Congress permanently withdrew the same lands as an addition to the Reservation. Act of Mar. 3, 1928, 45 Stat. 160. (hereafter, "1928 Lands"). At the time, neither the 1918 lands nor the 1928 lands were connected to or contiguous with the approximately 51,000 acres reserved as of 1906.

In 1936, Congress authorized the Secretary of the Interior ("Secretary") to add up to 171,200 acres of public lands to the Reservation, approximately 168,000 of which were withdrawn on September 25, 1936. Act of June 22, 1936, 49 Stat. 1806; Secretarial Order, 1 Fed. Reg. 2090–91 (Sept. 25, 1936) (hereafter, "1936 Lands"). Finally, in 1972, and pursuant to the 1936 Act, the Secretary withdrew about 2,900 additional acres of public lands for the Reservation. Pub. Land Order 5216, 37 Fed. Reg. 12,383 (June 19, 1972) (hereafter, "1972 Lands").

Today, the Reservation encompasses about 338,816.75 contiguous acres, including the 1918, 1928, 1936, and 1972 additions. For illustrative purposes, the United States and Tribe attach, as Attachment C, a map depicting the Reservation as of

1906, 1918, 1928, 1936, and 1972.

B. The initial litigation of the Tribe's surface water rights to the uninterrupted flows of the Walker River for the Reservation as it existed in 1924.[4]

On July 3, 1924, the United States filed a complaint in this Court to establish an uninterrupted surface right to the Walker River and enjoin upstream water users from interfering with the natural flow of the river "to and upon the Reservation." Transcript of Record Upon Appeal from the District Court of the United States for the District of Nevada at 16–17, *United States v. Walker River Irrigation Dist.* ("*Walker I*"), 11 F. Supp. 158, 162 (D. Nev. 1935) (No. 8779) ("App. R."). The United States alleged that the Reservation consisted of about 86,400 acres and that 10,000 of those acres were "susceptible of irrigation." App. R. at 7, 337.[5] At the time, the permanent Reservation was made up of the lands reserved as of 1906 and the noncontiguous 1918 Lands, only the former of which the United States asserted could be irrigated with the direct, uninterrupted flows of the Walker River. *See* App. R. at 477–79.

The United States asked the Court to (1) quiet title for the claimed water right to

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[4] The actions, arguments, evidence, and decisions that comprised the litigation initiated in 1924 are captured in the extensive appellate record created by the Ninth Circuit Court of Appeals when appeal was taken from the final 1936 decision by the District Court. Although the appellate record is both a public record and maintained by the Court of Appeals, for the convenience of the Court and the Parties, the United States and Tribe attach the Appellate Record as verified by their Expert Historian, Ian Smith. *See* Exhibit 1 – Affidavit of Ian Smith; Exhibit 2 - Transcript of Record Upon Appeal from the District Court of the United States for the District of Nevada, US0035366.

[5] The United States' initial complaint alleged that 150 cfs was needed to irrigate 11,000 acres. App. R. at 4. However, the case proceeded on the United States' claim for 150 cfs to serve 10,000 irrigable acres. This area was the number of acres allotted to the Tribe for irrigation in 1906. App. R. at 337.

surface water, (2) determine the relative rights of the parties to the surface waters of the river and its tributaries, and (3) permanently enjoin upstream water users from using the claimed water right, specifically, "interfering with the natural flow of 150 [cfs]" needed for the irrigation of the 10,000 acres. App. R. at 16–17. The United States' complaint addressed only surface water rights and did not mention, much less claim, storage rights, groundwater rights under the then-existing Reservation, or any water rights to lands that were not yet part of the Reservation. Defendants' answers asserted that the Tribe could feasibly irrigate no more than 2,500 acres and that, based on the doctrine of prior appropriation[6] (rather than the *Winters* Doctrine[7]) the Tribe was entitled to a natural flow right of only 23 cfs to irrigate 1,900 acres with priorities between 1868 and 1886. App. R. at 32, 34.

At the time the United States initiated the litigation in 1924, the Tribe had reclaimed and irrigated about 2,000 acres, producing hay, grain, and pasturage, and was unable to farm the remaining 8,000 irrigable allotted acres because unadjudicated upstream diversions significantly reduced instream flow in the Walker River. App. R. at

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[6] "Under [prior appropriation], the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time." *Arizona v. California*, 373 U.S. 546, 555 (1963) ("*Arizona I*"). The *Winters* Doctrine, however, not prior appropriation, governs federal reserved water rights. *Id.* at 597–602.

[7] The *Winters* Doctrine stands for the proposition that when a reservation is set aside for an Indian tribe, sufficient water is reserved to accomplish the purposes of the reservation. *Winters v. United States*, 207 U.S. 564, 576–77 (1908); *Cappaert v. United States*, 426 U.S. 128, 139 (1976); *Arizona I*, 373 U.S. at 597–602.

8, 342. Development of groundwater for irrigation on the reservation was then non-existent and had been deemed to be impracticable due to the high cost of electricity required to pump the water.[8] In addition, the United States was still studying potential reservoir development options but had not made decisions about the location, capacity, or funding of construction.[9]

The Court referred the case to a special master, who held hearings and took evidence between March 22, 1928, and December 30, 1932. *Walker I*, 11 F. Supp. at 162. The hearings focused on whether the Tribe could feasibly irrigate 10,000 acres with the natural flow of the Walker River. *See* App. R. at 680–746, 809–961. Subject to the United States' continuous objections, Defendants' attorneys repeatedly questioned federal officials about possible on-reservation reservoir construction. *See, e.g.*, App. R. at 859 (testimony of John A. Beemer); App. R. at 1484–86 (testimony of J. C. Stevens); App. R. at 1452–55 (testimony of Elvin W. Kronquist). To defeat the United States' 150 cfs uninterrupted flow water right claim and to justify its contention that the Tribe was

[8] Letter from W. H. Code to J.R. Meskimons (Feb. 6, 1906) (Exhibit 3 – US0005727); W. H. Code, Chief Engineer, U.S. Indian Inspection Service, to the Secretary of the Interior ("SOI") (July 7, 1906) (Exhibit 4 – US0034274); Millin, Regional Forester, to the Commissioner of Indian Affairs (June 16, 1938) (Exhibit 5 – US0044644); [E. W. Kronquist], Walker River O&M Report (July 1937) (Exhibit 6 – US0006968).

[9] *Irrigation Dam on Walker River, Nev.*: Hearing on S. 2826 Before the Senate Committee on Irrigation and Reclamation (1926); W. E. Blomgren, *Report on Water Supply and Storage Investigations of Walker River Indian Reservation, Nev.*, H. Doc. 767, 69th Congress, 2d session (1926) ("Blomgren Report"). In addition, the United States was most actively considering a reservoir site well upstream of the current location of Weber dam. The contemplated Rio Vista Reservoir would have had nearly *three times* the capacity of Weber Reservoir. *See* Blomgren Report at 45–55.

entitled to enough water to irrigate only around 1,900 acres at that time, Defendant Walker River Irrigation District ("WRID")[10] tried to show that a reservoir could supply all the Tribe's additional irrigation needs, up to the 10,000 acres claimed, *if* the tribe later put the land to beneficial use. *See* App. R. at 680–746, 809–961. Defendant WRID relied heavily on the Blomgren Report, a Department of the Interior/Bureau of Indian Affairs study of potential storage options, to support its argument regarding the feasibility of irrigating the allotted 10,000 acres from storage. App. R. at 633, 870, 957, 961. However, the United States maintained throughout litigation that an uninterrupted natural flow of 150 cfs from the Walker River, with priority dating back to 1859, could feasibly irrigate the Tribes' 10,000 acres if left unimpeded by upstream users. App. R. at 335–41, 474–84.

The Special Master allowed WRID's line of questioning concerning the potential for storage; but as no reservoir existed at that time and no on-reservation storage claims were before the Special Master, he did not address on-reservation storage in his Conclusions of Law or proposed Decree. *See* App. R. at 430–72. The Special Master did, however, recognize the potential for a reservoir in his Findings of Fact, noting the United States' ongoing study of storage right possibilities to "augment" the Tribe's direct flow right in the future. App. R. at 503. In response, the United States' Exceptions to the Special Master's report emphasized that the Blomgren Report had never been submitted into evidence, signed, or approved by BIA or Congress, and that no appropriation of

[10] The entity appearing in the initial litigation in this case is the same entity that appears before this Court today.

funds for construction followed the investigation. App. R. at 481–82. Without such authorization and appropriation, the United States had no basis on which to make a claim for storage.

The authorization and appropriation for construction of a reservoir occurred in 1933, after the Special Master closed the evidentiary record.[11] Subsequently, Defendant WRID twice unsuccessfully attempted to reopen evidence to show that reservoir construction had begun and demonstrate that it would create "8,000 acre feet of additional storage" to irrigate beyond the 1,900 acres they asserted were presently irrigated.[12] Ultimately, no evidence of an on-reservation storage right was ever presented to the Court.

In 1934, the Special Master submitted his second report recommending that the United States receive a *Winters* right to the continuous flow of 26.25 cfs from the Walker River, with a priority date of November 29, 1859, to irrigate 2,100 acres of Reservation lands. *Walker I*, 11 F. Supp. at 162. In June 1935, the Court issued its opinion rejecting the Special Master's recommendation. *Id.* at 167. Though at first the

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[11] Harold L. Ickes, [SOI], Federal Emergency Administrator of Public Works, January 16, 1939, in Appendix C, Brief for Appellees, *United States v. Walker River Irrigation Dist.*, 104 F.2d 334 (1939) ("Walker III") Case No. 8779, U.S. Circuit Court of Appeals for the Ninth Circuit (Exhibit 9 – US0044648).

[12] Harold L. Ickes, [SOI], Federal Emergency Administrator of Public Works (Jan. 16, 1939); Letter from W. M. Kearney, attorney for WRID, to Ethelbert Ward, Special Assistant Attorney General (Jan. 12, 1934) ("January 1934 Letter") (Exhibit 7 – US0035222). Defendant WRID twice unsuccessfully tried to convince the United States to stipulate that construction was "well under way." January 1934 Letter; Letter from W. M. Kearney to Ethelbert Ward (Sept. 12, 1934) (Exhibit 8 – US0035287).

Court denied any tribal water right, it ultimately decreed five state-law-based water rights to the flow of the Walker River, with varying priorities, totaling only 22.93 cfs to irrigate about 1,900 acres–nearly identical to what Defendants had proposed for the Tribe. App. R. at 499, 515–16. The Court did not analyze on-reservation storage, but it did recognize that "[t]he [United States'/Tribe's] water problem at the reservation might be solved by accepting and acting upon the recommendations of its engineers" to construct a reservoir. *Walker I*, 11 F. Supp. at 165. Just as the Special Master had, the District Court recognized that a reservoir on the Reservation remained a possibility in the future. *Id.*

The United States appealed, and in June 1939, the Ninth Circuit reversed–but only insofar as the District Court had failed to recognize a reserved right under federal law. The Ninth Circuit did not recognize the United States' claim for 150 cfs from the direct, uninterrupted flows of the Walker River to irrigate 10,000 acres and, thus, the claim that the United States litigated was rejected. The Ninth Circuit instructed the Court to enter a new decree utilizing the Special Master's initial recommendation, awarding the United States a *Winters* right

> to the continuous flow of 26.25 [cfs], to be diverted from Walker River upon or above [the] Reservation during the irrigation season of one hundred and eighty days for the irrigation of two thousand one hundred acres of land on the [R]eservation, and the flow of water reasonably necessary for domestic and stock watering purposes and for power purposes to the extent now used by the Government, during the non-irrigating season, with a priority of November 29, 1859, and enjoining the defendants from preventing or interfering with the natural flow of the described quantities of water in the channels of the stream and its tributaries to and upon the [R]eservation.

Walker III, 104 F.2d at 340. In 1940, on remand from the Ninth Circuit, this Court amended the 1936 Decree accordingly. 1936 Decree ¶ I.

After the Decree was entered, and recognizing the unresolved nature of the Tribe's storage right, Defendant WRID was "very much exercised . . . [to] specifically set forth the storage priority for the Indian's Weber Reservoir" in order to reduce the possibility that the right would date back to 1859.[13] The United States alternatively hoped to ensure any potential storage right would be guaranteed a priority date of July 1, 1933.[14] However, after Defendants hypothesized and the United States confirmed that there were no intervening priority rights between 1933 to 1936, the United States agreed to stipulate to an April 15, 1936 priority.[15] Accordingly, based on this concern and on the agreement of the parties, the Court amended the Decree to read: "This decree shall be deemed to determine all of the rights of the parties to this suit and their successors in interest in and to the waters of Walker River and its tributaries *as of the 14th day of April, 1936* . . . ." 1936 Decree ¶ XII, *as amended by*, 1940 Amendments at 3.

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[13] Letter from Roy W. Stoddard to the Attorney General (Nov. 24, 1939) (Exhibit 10 – US0036570).

[14] Correlating to the date that construction on Weber Dam began, July 1, 1933.

[15] Letter from Roy W. Stoddard to the Attorney General (Nov. 24, 1939) (Exhibit 10 – US0036570); Letter from Oscar L. Chapman to the Attorney General (Nov. 1, 1939) (Exhibit 11 – US0036567); Letter from Roy W. Stoddard to the Attorney General (Jan. 11, 1940) (Exhibit 12 – US0036583); Letter from Norman M. Littell to Roy Stoddard (Jan. 22, 1940) (Exhibit 13 – US0036585). The parties did not discuss or stipulate to any other details of the Tribe's potential storage right beyond priority.

In sum, the litigation addressed what the United States put before the Court–the Tribe's single claim to the direct, uninterrupted flow of the Walker River for 10,000 irrigable acres on the Reservation as it existed in 1924. Potential on-reservation storage was only raised by Defendants when WRID attempted to defeat the United States' claim and to show the limits of the Tribe's then-existing water use, around 1,900 acres. The Court did not address an on-reservation storage right, let alone a storage right specifically for Weber Reservoir. Finally, neither pleadings, testimony, the Special Master, nor the Court ever placed at issue or addressed groundwater rights or water rights for lands beyond the 86,400 acres comprising the Reservation in 1924.

C. The present litigation of the Tribe's water rights in the Walker River Basin.

By the very terms of the 1936 Decree, the jurisdiction of the Court to oversee and modify the Decree is ongoing. *United States v. Walker River Irrigation Dist.*, 890 F.3d 1161, 1169 (9th Cir. 2018) ("*Walker IV*"). In January 1992, WRID filed a first amended complaint against the California State Water Resources Control Board, invoking this Court's continuing jurisdiction over the waters of Walker River and seeking to enjoin certain restrictions on its California water licenses and, if necessary, to modify the rights held by WRID. Defs' Pet., No. C-125-A (Jan. 3, 1992). In March 1992, the Tribe answered WRID's petition and filed two counterclaims for additional water rights: (1) a storage right for Weber Reservoir, and (2) a water right for lands added to the Reservation in September 1936. *See Notice of Filing Answer to First Amended Petition, and Counterclaim and Cross-Claim of the Walker River Paiute Tribe* (Dec. 15, 1992) (ECF No. 18). In July 1992, the United States sought leave to file its own counterclaims

for the benefit of the Reservation that were substantially the same as the Tribe's counterclaims. *See United States of America's Motion for Leave to File Counterclaim* (July 23, 1992) (ECF No. 3); *Counterclaim of the United States of America* at 4-5 (Dec. 15, 1992) (ECF No. 17).

Both WRID and the State of Nevada moved the Court to dismiss the Tribe's and United States' counterclaims, and moved in the alternative to require the United States and Tribe to join and serve all claimants to the waters of Walker River Basin as defendants in this action. *Walker River Irrigation District's Motions to Dismiss Counterclaims to Require Joinder of Parties and to Require Service of Process in Accordance with Rule 4 of the Federal Rules of Civil Procedure* (Aug. 3, 1992) (ECF No. 5); *State of Nevada's Preliminary Threshold Motions Re Dismissal of Counterclaims, Additional Parties and Service of Process* (Aug. 3, 1992) (ECF No. 6). In October 1992, the Court denied the motions to dismiss but granted WRID's alternative motion to require the joinder and service of all claimants to the waters of Walker River and its tributaries. *Order* at 7 (Oct. 27, 1992) (ECF No. 15).

In April 1994, the United States asked the Court whether its 1992 order required joinder of groundwater users in the Walker River Basin. *Motion for Instructions and Order* (Apr. 7, 1994) (ECF No. 23). In requesting clarification, the United States noted that its previous claim and decreed water right were "made out of the natural flow of the Walker River and its tributaries," and that "[i]t does not appear from either the pleadings or the [1936] Decree that groundwater users were included, or intended to be included, in the original proceedings." *Memorandum of Points and Authorities in*

Support of Motion for Instructions and Order (Apr. 7, 1994) (ECF No. 23).

The Tribe responded that, "[p]reviously, the only rights recognized in these proceedings have involved the use of the surface waters of the Walker River and its tributaries. Indeed, the Tribe's pending claims for the recognition of additional water rights are limited to the use of the surface waters of the Walker River." *Walker River Paiute Tribe's Response to the United States' Motion for Instructions and Order* (May 24, 1994) (ECF No. 26). The Tribe nonetheless supported the joinder of groundwater users due to the hydrological connection of groundwater to Walker River and its tributaries. *Id.* at 10–11.

The State of Nevada agreed with the United States and Tribe "that the Walker River Decree only involves the users of surface waters," but argued that the State Engineer, not the Court, should regulate groundwater. *State of Nevada's Response to Motion for Instructions and Order* at 2 (May 24, 1994) (ECF No. 28). Nevada therefore opposed the joinder of groundwater users. *Id.* at 3.

In July 1994, the Court clarified that its 1992 order "did NOT require joinder of groundwater claimants." *Order* at 12 (July 8, 1994) ("1994 Order") (ECF No. 30) (emphasis in original). The Court found that the 1936 Decree, as amended, did not contemplate groundwater, storage in Weber Reservoir, or lands later added to the Reservation:

> [The Decree] adjudicated only the rights of the claimants to the surface waters of the Walker River and *did not concern itself in any way with underground water rights.*

The current counterclaims of the U.S. and the Tribe seek to establish new

> and additional water rights. Both parties claim *a new right* to store waters drawn from the Walker River at Weber dam, rather than being limited to immediate use of the water. Both parties also seek a right to use waters from the Walker River *on reservation lands not contemplated by the decree*.

Id. at 3 (emphasis added).

In July 1997, both the Tribe and United States amended their counterclaims to add claims for groundwater underlying the Reservation, including lands restored to the Reservation. *First Amended Counterclaim of the Walker River Paiute Tribe* at 17 (ECF No. 58); *First Amended Counterclaim of the United States of America* at 13 (July 31, 1997) (ECF No. 59). The original counterclaims for storage in Weber Reservoir and the use of water on lands restored to the Reservation remained the same.

In April 2000, in view of the added groundwater claims, the Court ordered the United States and Tribe to name as defendants and serve all water right claimants in the Walker River Basin, including all groundwater users. *Case Management Order* at 5–6 (Apr. 18, 2000) (ECF No. 108). In February 2015, after service was completed, WRID filed a motion to dismiss the United States' and Tribe's counterclaims based on lack of subject matter jurisdiction. *Walker River Irrigation District's Motion to Dismiss Claims of United States Based upon State Law Pursuant to Fed. App. R. Civ. P. 12(b)(1)* (Feb. 9, 2015) (ECF No. 2161). After briefing concluded, the Court granted dismissal of the United States' and Tribe's counterclaims based on *res judicata*, laches, and lack of jurisdiction. *Order* at 9–18 (May 28, 2015) (ECF No. 2223). The United States and Tribe appealed to the Ninth Circuit, which in May 2018, reversed and remanded the order and reassigned the case to a different district judge. *Walker IV*, 890 F.3d at 1174.

In reversing the District Court, the Ninth Circuit ruled that claim preclusion and issue preclusion do not apply and instead found that the United States' and Tribe's claims may be subject to "principles of finality and repose" under *Arizona II*. *Id.* at 1173 (quoting *Arizona v. California*, 460 U.S. 605, 619 (1983)) ("*Arizona II*").

In May 2019, the United States and Tribe amended their counterclaims once more to articulate with specificity claims that were tied closely to the evidence on which they intended to rely. But at the core, the United States and Tribe claimed water rights substantially the same as before: (1) a storage water right associated with Weber Reservoir; (2) a groundwater right associated with lands added to the Reservation by executive and congressional action in 1918, 1928, 1936, and 1972;[16] and (3) a groundwater right underlying all lands within the exterior boundaries of the Reservation, some of which have been held in trust by the United States for the Tribe since 1859. US Amended Counterclaim at 4–6; Tribe Amended Counterclaim at 6–7. In their answers, Principal Defendants asserted a myriad of affirmative defenses. *See, e.g.*, Sample WRID Answer.

In February 2020, the United States and Tribe moved this Court for judgment on the pleadings on five of Principal Defendants' affirmative defenses: (1) laches, (2) estoppel and waiver, (3) no reserved rights to groundwater, (4) the United States lacks the power to reserve water rights after Nevada statehood, and (5) claim and issue preclusion. *Joint Motion for Judgment on the Pleadings* (Feb. 20, 2020) (ECF No.

[16] With the Tribe separately claiming a water right to surface waters found on those lands reserved in 1928, 1936, and 1972.

2606). In response, Principal Defendants largely conceded the motion but then argued alternative defenses: finality and repose (Third Affirmative Defense), that the Tribe could not have both a surface water and groundwater right (Twelfth Affirmative Defense), and that the 1936 Act precluded additional water rights (Fourteenth Affirmative Defense). *Principal Defendants' Opposition to Plaintiffs' Motion for Judgment on the Pleadings* (May 19, 2020) (ECF No. 2619) ("Defs' Response"). Although the United States and Tribe addressed all arguments raised in Defendants' response, the Court ultimately granted relief on only the affirmative defenses challenged by Plaintiffs' motion. MJOP Order at 10–11.

Accordingly, the United States and Tribe now move the Court for summary judgment on all three affirmative defenses on which Principal Defendants previously relied to defend against Plaintiffs' Motion for Judgment of the Pleadings. In addition, the United States and Tribe move the Court for summary judgment on Defendants' Seventh Affirmative Defense: that there is no water right for the added lands because their purpose can be served by the Tribe's decreed right to 26.25 cfs. Because no genuine dispute of material fact exists over these four affirmative defenses and they are invalid as a matter of law, the United States and Tribe are entitled to summary judgment dismissing these defenses.

IV. STATEMENT OF MATERIAL FACTS

Pursuant to Fed. R. Civ. P. 56(c) and D. Nev. R-Civ. 56-1, the Tribe and the United States present a short list of undisputed material facts supporting this motion in Attachment B, which the Tribe and the United States specifically incorporate by

reference. This statement supports section V.A regarding the Principal Defendants' Third Affirmative Defense–finality and repose. Sections V.B–D demonstrate that Principal Defendants' Seventh, Twelfth, and Fourteenth Affirmative Defenses are plainly incorrect as a matter of law and require no factual analysis.

V. ARGUMENT

A. The United States and Tribe are entitled to Summary Judgment on Principal Defendants' Third Affirmative Defense because principles of finality and repose are inapplicable to the United States' and Tribe's claims to storage, groundwater, and water for the added lands.

Principal Defendants' Third Affirmative Defense asserts that general principles of finality and repose under *Arizona II* preclude this Court from modifying the 1936 Decree to recognize additional water rights for the Tribe. *See, e.g.*, Sample WRID Answer at 6 (Third Affirmative Defense). But this affirmative defense is inapplicable to the undisputed circumstances here, and Defendants' arguments reveal that they fundamentally misconstrue the principles and application of finality and repose. Under *Arizona II*, only claims *previously litigated* are precluded by finality and repose; and even then, a court may still override the application of finality and repose if justified by unforeseen or changed circumstances. *Arizona II*, 460 U.S. at 612; *Walker IV*, 890 F.3d at 1170. According to the Ninth Circuit, these *Arizona II* principles apply to the 1936 Decree here, and the United States "retain[ed] jurisdiction in the Nevada district court to litigate additional rights in the Walker River Basin." *Walker IV*, 890 F.3d at 1171.

There is no genuine dispute of material fact that *Walker I* litigated only the Tribe's direct flow surface water right claim (150 cfs) from the uninterrupted flows of

the Walker River to irrigate 10,000 acres within the Reservation as it existed in 1924. The parties did not litigate storage water rights associated with Weber Reservoir; they did not litigate groundwater rights; and they did not litigate water rights for lands later added to the Reservation. Because the United States' and Tribe's counterclaims were not previously litigated, they are simply not precluded by principles of finality and repose under *Arizona II*. Therefore, this Court has continuing jurisdiction to litigate these claims, and the United States and Tribe are entitled to summary judgment as to Principal Defendants' Third Affirmative Defense.

The following section discusses *Arizona II*'s analysis of finality and repose in detail before applying it to the facts at hand.

1. Principles of finality and repose announced in *Arizona II* preclude only previously litigated claims.

Arizona II established two distinct scenarios where a court, under its continuing jurisdiction as retained by a decree, can modify the decree to include additional water rights: (1) where the claim has not yet been litigated, and (2) where an already litigated claim should nonetheless be relitigated due to changed or unforeseen circumstances. *Arizona II*, 460 U.S. at 612.

In *Arizona II*, the United States and five Indian tribes on the lower Colorado River invoked the Supreme Court's continuing jurisdiction under the Colorado River Decree to consider two types of claims: (1) additional surface water rights for lands within the reservations' uncontested boundaries that were "omitted" from, or not included in, the United States' original practicably irrigable acreage ("PIA")

calculation; and (2) additional water rights for lands that were not part of the original suit and for which no water rights were previously litigated. 460 U.S. at 615, 628. The *Arizona I* decree retained the Court's modification jurisdiction as follows:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

See Id. at 618.

First, the Court considered whether, under the modification clause of the decree, it had continuing jurisdiction to reopen the decree and recalculate prior PIA determinations to include irrigable acres "omitted" from evidence in *Arizona I*. *Id.* at 612, 615. Leading up to the *Arizona I* decision, the Special Master had received briefs, expert reports, and witness testimony on the PIA calculation before making a detailed PIA determination.[17] *Arizona v. California*, 373 U.S. 546, 596 (1963). The *Arizona I* Court adopted the Special Master's Report on PIA wholesale. *Id.* at 601.

Drawing on only "principles" of claim preclusion (the doctrine itself was not applicable because the claims were raised in the same case), the *Arizona II* Court observed that "a fundamental precept of common-law adjudication is that an issue once determined by a court of competent jurisdiction is conclusive" and precludes parties from contesting matters that they had already "fully and fairly litigated" to "reconsider

[17] In the course of the *Arizona I* argument, the United States went so far as to assure the Court that, while there *may* be additional irrigable acres within the reservation, it would not claim them later in the litigation. *Id.* at 622 n.14.

whether initial factual determinations were correctly made." *Arizona II*, 460 U.S. at 622–25. It reasoned that the aforementioned principles advised against a "retrial of factual issues" that the parties, the Special Master, and the Court all understood to be resolved. *Id.* at 620–23. Finding this to be the case based on the extensive record in *Arizona I*, the Court found that the recalculation of PIA to include "omitted" lands was precluded by finality and was not within the scope of its continuing jurisdiction. *Id.* at 628.

In its analysis of the omitted lands, the Court additionally noted that it could still reopen an already litigated claim based on "changed circumstances or unforeseen issues," thus recognizing a second type of claims, beyond those not yet litigated, that were not barred by finality and repose.[18] *Id.* at 622. In *Arizona II*, however, the United States and tribes did not "seriously" contend "that the claim for omitted lands [was] predicated upon an unforeseeable change in circumstances." *Id.* at 625 n.18.

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[18] Defendants will likely argue, as they have previously, that the only decree modification not barred by finality is an addition of rights under changed or unforeseen circumstances. Defs' Response at 32–33. In their Response to Plaintiffs' Motion for Judgment on the Pleadings, Defendants asserted that their argument was backed by the plain reading of the statement in *Arizona II* that, "[the Court's continuing jurisdiction]. . . should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Id* at 17. However, Defendants' argument removes this quote from its context and the Court's analysis discussed *supra*. This qualification applies only *after* the court finds that principles of finality and repose preclude a claim. *Id.* As discussed above, claims for *additional rights not yet litigated* are not subjected to the preclusive effect of finality and the qualification is irrelevant. Defendants' interpretation erases entirely the Court's initial finality analysis, impermissibly expanding the doctrine to apply to nearly every possible decree modification.

Next, the Court in *Arizona II* analyzed whether the tribes "were entitled to an upward adjustment of their water rights" based on the PIA of reservation lands that were not previously litigated because they were either disputed during the original litigation or added post-decree. *Id.* at 631. For lands that were added later by either Congress or judicial decree, the Supreme Court did not hesitate to hold—without any discussion of finality and repose or consideration of changed or unforeseen circumstances—that the tribes should receive increased water rights based on the PIA of the added lands. *Id.* at 640–41. The Court subsequently affirmed the Special Master's determinations that the Cocopah Indian Reservation and Fort Mojave Indian Reservation were entitled to additional water rights for 1,161 irrigable acres and approximately 500 irrigable acres, respectively. *Id.* at 633, 640–41.

In sum, because the PIA of then existing reservation lands had been fully and fairly litigated in *Arizona I* and because the claimants did not allege changed or unforeseeable circumstances, the Court, applying principles of finality and repose, refused to reopen and reconsider the plaintiffs' previous PIA calculations. Conversely, these same principles of finality and repose had no bearing on the unlitigated PIA claims under the Court's continuing jurisdiction, and the Court did not require changed or unforeseen circumstances before recognizing increased water rights for lands added after the decree.

The Ninth Circuit confirmed that this reading of finality under *Arizona II* applies to this case, and the Court should follow the same approach with respect to the United States' and Tribe's unlitigated counterclaims here. In *Walker IV*, the Court found that

Arizona II "construed a water rights decree with similar jurisdictional language as retaining jurisdiction to address *yet-unlitigated* rights to the same waterway," such that the Decree "may properly be read as also retaining jurisdiction . . . to litigate additional rights in the Walker River Basin." 890 F.3d at 1170–71 (emphasis added). The Court affirmed that "no party may *relitigate* a claim to water rights in the Walker River Basin . . . that was *litigated* in the original case as of April 14, 1936." *Id.* at 1171–72 (emphasis added). Thus here, as in *Arizona II*, principles of finality and repose preclude only previously litigated claims (absent changed or unforeseen circumstances), but do not preclude the United States' and Tribe's unlitigated counterclaims.

2. The only claim previously litigated was an uninterrupted, direct-flow surface water right to the Walker River for the Reservation as it existed in 1924.

As summarized in Section III, the only tribal claim previously litigated was an uninterrupted, direct-flow surface water right to the Walker River associated with 10,000 acres of irrigable land within the Reservation as it existed in 1924. *Walker I*, 11 F. Supp. at 159, 162–63; App. R. at 7–9.[19] The claim did not account for future additions of land in 1928, 1936, and 1972, nor did the claim contemplate future storage and groundwater uses. Defendants agree and concede in part, "[t]he Decree, of course, did not recognize a storage right at Weber Reservoir or any groundwater rights from the Tribe . . . because neither the Tribe nor the United States sought those rights . . . ." Defs' Response at 40–41. Thus, the *only* claim subject to preclusion by finality and repose

[19] *See* Attachment B - Statement of Undisputed Material Facts ¶ 1.

would be a claim for additional uninterrupted, direct-flow surface water rights to irrigate more land within the 86,000 acres that made up the Reservation as of 1924.

As discussed in more detail below, the parties, the Special Master, and the Court were aware that storage, groundwater, and water rights for the added lands were not the subject of *Walker I*. Because the United States' and Tribe's counterclaims have not yet been litigated, they cannot be precluded by finality and repose, and Plaintiffs are entitled to summary judgment on Defendants' Third Affirmative Defense.

a. The Tribe's storage right for Weber Reservoir has not yet been litigated.

There is no genuine dispute of material fact that the parties and the Court understood that the Tribe's storage right for Weber Reservoir was not fully and fairly litigated in *Walker I*.[20]

As demonstrated by the court record, on-reservation storage was not raised in either the United States' complaint, Defendants' answers, or subsequent briefs/actions of the parties.[21] Evidence of on-reservation storage was raised only through testimony elicited by Defendants to show the hypothetical augmentation of the Tribe's surface right to irrigate *beyond* 1,900 acres.[22] What's more, Defendants, particularly Defendant

[20] *See* Attachment B - Statement of Undisputed Material Facts ¶¶ 1 and 2.

[21] *See* Attachment B - Statement of Undisputed Material Facts ¶ 2(a).

[22] *See* Attachment B - Statement of Undisputed Material Facts ¶ 2(b)–(c).

WRID, were well aware that the issue was not in front of the Court and thus attempted–unsuccessfully–to stipulate to the initiation of Weber Reservoir's construction in 1933.[23]

Further, the Special Master issued no findings of fact concerning the existence or quantity of an on-reservation storage right, although he acknowledged the possibility of future storage projects.[24] Likewise, the Court included no analysis of such a claim in its opinion, only stating that the contemplated Rio Vista Reservoir could provide water to the Reservation beyond the amount "presently supplied" to the 2,100 irrigated acres.[25] In the end, all parties recognized the unresolved nature of the Tribe's storage right and, by joint stipulation, added the phrase "as of the 14th day of April, 1936" to Paragraph XII of the Decree in order to establish a priority date for when the right was eventually litigated.[26]

By comparison, *Arizona II* applied finality and repose to preclude additional water rights for the "omitted" lands because the irrigability of those reservation lands had been

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[23] *See* Attachment B - Statement of Undisputed Material Facts ¶ 2(d).

[24] *See* Attachment B - Statement of Undisputed Material Facts ¶ 2(e)–(f).

[25] *See* Attachment B - Statement of Undisputed Material Facts ¶ 2(g)–(h).

[26] *See* Attachment B - Statement of Undisputed Material Facts ¶ 2(i). In contrast with the Tribe's unlitigated on-reservation storage right, Defendants' storage rights were clearly placed at issue and litigated. Defendant WRID claimed for itself a storage right to waters of the Walker River for Bridgeport and Topaz Reservoirs, asserting an August 8, 1919 priority right for 57,000 acre-feet and a February 21, 1921 priority right for 85,000 acre-feet respectively. App. R. at 76–79. Both rights related back to the date construction began on each project. App. R. at 76–79. The Special Master heard testimony on each and proposed detailed storage rights, which were subsequently accepted and quantified by the Court to supplement WRID's instream flow rights. 1936 Decree at 64, 65.

the very subject of the first phase of the litigation. Previously in *Arizona I*, the PIA calculation was subject to the rigors of a trial that allowed the parties to present evidence and fully brief the issue. The *Arizona I* Special Master substantially addressed it in his report, and that report was affirmed by the Court. Conversely here, the Tribe's storage right was never claimed, and the only evidence of a reservoir was elicited to attempt to defeat the claimed right to the natural flow. Nothing in the record similarly demonstrates a claimed tribal storage right litigated by the parties or decided by the Court. Therefore, the United States' and Tribe's storage claim was not fully and fairly litigated in *Walker I*, and it is not precluded by finality and repose under *Arizona II*.

b. The Tribe's groundwater right has not yet been litigated.

The Tribe's groundwater right claim similarly has not yet been litigated. In 1994, this Court explicitly held as much. It found that the only claim adjudicated for the Reservation in the original suit was a right "to the surface waters of the Walker River" and that the 1936 Decree, as amended, "did not concern itself *in any way* with underground water rights." 1994 Order at 3 (emphasis added).[27]

Moreover, as a practical matter, groundwater could not have been litigated in *Walker I* because it was not used by the Tribe for irrigation until after the Decree was entered.[28] Thus, groundwater was not contemplated as an issue in need of litigation, was

[27] *See* Attachment B - Statement of Undisputed Material Facts ¶ 3(b).

[28] W. H. Code, Chief Engineer, U.S. Indian Inspection Service, to the SOI (July 7, 1906). The first two groundwater wells drilled on the reservation were the Pilot Cone well, which was drilled in June 1938 but lacked a pump engine, and the Robber's Roost well, which was only being discussed as a possible development project in 1937. Millin to the

not raised by either party in their filings or testimony, and was not mentioned or considered by the Court.[29] Unlike the PIA calculations in *Arizona II*–which arose from reports, testimony, and briefs–the Tribe's groundwater use and any related right was entirely absent from all litigation.

Because the record demonstrates that the Tribe's groundwater rights were not litigated in *Walker I* and this Court has recognized as much, the United States' and Tribe's groundwater claims here are not precluded by principles of finality and repose.

c. The Tribe's water rights to the lands added in 1928, 1936, and 1972 have not yet been litigated.

Finally, the initial phase of this case concerned only the Tribe's water right to irrigate lands within the Reservation as it existed in 1924. The case did not and could not have considered water rights for additional lands that had yet to be added to the Reservation.[30] And at no point in the trial did Plaintiffs or Defendants allege water rights claims for additional acres.

Unlike the "omitted" lands in *Arizona II* that were within the reservation boundaries used for the tribes' PIA calculations, here the added lands are wholly outside the 86,400 acres used to determine the Tribe's allocation in *Walker I*.[31] Rather, like the

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Commissioner of Indian Affairs (June 16, 1938); [E. W. Kronquist], Walker River O&M Report (July 1937).

[29] *See* Attachment B - Statement of Undisputed Material Facts ¶ 3(a).

[30] *See* Attachment B - Statement of Undisputed Material Facts ¶ 4(b).

[31] *See* Attachment B - Statement of Undisputed Material Facts ¶ 4(a).

disputed and added lands for which *Arizona II* modified the Colorado River Decree, so too here the 1928, 1936, and 1972 Lands were not part of the Reservation until after the trial was well underway or completed. Necessarily, they were not considered when the Court calculated the Tribe's uninterrupted surface-flow right circa 1924 under the 1936 Decree. Thus, the United States' and Tribe's water right claims for the added lands too have yet to be litigated and are not precluded by finality and repose.

In sum, the Court previously adjudicated only a single water right for the Reservation—an uninterrupted, direct-flow surface water right from the Walker River to irrigate lands within the Reservation boundaries at the time the United States filed its claim. It did not adjudicate the Tribe's storage right (to Weber Reservoir, Rio Vista, or any hypothetical Tribal reservoir), the Tribe's groundwater rights, or the Tribe's water rights for the 1928, 1936, and 1972 Lands. Therefore, the United States' and Tribe's counterclaims are not precluded by principles of finality and repose, and Plaintiffs are entitled to summary judgment on Defendants' Third Affirmative Defense.

3. It is irrelevant what claims could have been litigated.

Defendants will likely argue, as they have before, that even if the United States' and Tribe's counterclaims have not yet been litigated, the counterclaims should nonetheless be precluded by finality and repose because they "could have" been litigated before the Decree was issued in 1936. Defs' Response at 18–20, 23–26. However, the Supreme Court has found that such an argument misconstrues finality and repose under *Arizona II*. *Arizona v. California*, 530 U.S. 392, 412–13 (2000) ("*Arizona III*"). It is

irrelevant whether a claim "could have" been litigated because principles of finality and repose preclude only reopening claims *actually* litigated. *Id.*

In *Arizona III*, the United States and Quechan Tribe sought additional water rights for 25,000 acres of formerly disputed lands that were not attributed to the Fort Yuma (Quechan) Indian Reservation in *Arizona I* and, therefore, were not contemplated by the Colorado River Decree. *Id.* at 397. The defendants argued that finality principles enunciated in *Arizona II* precluded the tribe's claims because they could have been raised in the original suit but were not. *Id.* at 406–07. The United States and Tribe responded that principles of finality and repose did not preclude unlitigated claims for formerly disputed reservation lands regardless of whether they "could have" been litigated at the time of the original claim, and that, in any event, the defendants did not timely raise their defense. *Id.* at 408 & n.2.

Rather than reach the merits of the defendants' preclusion defense, the Court rejected it as untimely. *Id.* at 408–09. Nonetheless, in response to defendants' request to dismiss the tribe's claim *sua sponte* under finality and repose, the Court shed light on how finality principles apply to unlitigated claims that could have been raised:

> This Court plainly has not "previously decided the issue presented." Therefore[,] we do not face the prospect of redoing a matter once decided. Where no judicial resources have been spent on the resolution of a question, trial courts must be cautious about raising a preclusion bar *sua sponte*, thereby eroding the principle of party presentation so basic to our system of adjudication.

Id. at 412–13 (quoting *United States v. Sioux Nation*, 448 U.S. 371, 432 (1980).[32] Thus, the Court declined to dismiss the tribe's claims based on principles of finality and repose. *Id.*[33]

As with the claims addressed in *Arizona III*, this Court has not previously decided any issues related to, nor have any judicial resources been spent resolving, the United States' and Tribe's counterclaims for Weber Reservoir storage, groundwater, or water

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[32] Similarly, the courts have long held that "*res judicata* does not apply to events post-dating the filing of the initial complaint." *Howard v. City of Coos Bay*, 871 F.3d 1032, 1039–40 (9th Cir. 2017) (citing Morgan *v. Covington Twp.*, 648 F.3d 172, 177–78 (3d Cir. 2011)); *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016); *Bank of New York v. First Millennium, Inc.*, 607 F.3d 905, 919 (2d Cir. 2010); *Smith v. Potter*, 513 F.3d 781, 783 (7th Cir. 2008); *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 529–30 (6th Cir. 2006); *Mitchell v. City of Moore, Oklahoma*, 218 F.3d 1190, 1202 (10th Cir. 2000); *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992); *Ellis v. CCA of Tennessee LLC*, 650 F.3d 640, 652 (7th Cir. 2011).

[33] *Cf. Nevada v. United States*, 463 U.S. 110, 129–30 (1983) (where the court *did not* retain jurisdiction to modify decree, *res judicata* bars "'the claim or demand [previously] in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered [to sustain or defeat the claim or demand].'") (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876).

The Ninth Circuit has explicitly held that *United States v. Nevada* is distinguishable from *Arizona II* and this case "on both form and substance" and is inapplicable here, *Walker IV*, 890 F.3d at 1172 n.13. This is because, unlike under the 1936 Decree, the *Nevada* court had *not* retained jurisdiction to modify the decree. *Nevada*, 463 U.S. at 129–30, 133–34, 145. Thus, it applied *res judicata* to the additional water rights at issue. *Id.*; *cf. Arizona II*, 460 U.S. at 617 (but for retained jurisdiction provision in decree "[t]here is no question [the Court] would be without power to reopen the matter due to the operation of *res judicata*"); *Nebraska v. Wyoming*, 515 U.S. 1, 9 (1995) (retained jurisdiction to modify a decree "'eases a [party's] burden of establishing, as an initial matter, that a claim [for modification] is . . . entitled to relief,'" but burden is heavier if the party seeks "'a reweighing,'" or relitigation, of an equitable apportionment of water) (quoting *Nebraska v. Wyoming*, 507 U.S. 584, 593 (1993).

rights for added lands. In adjudicating the United States' and Tribe's counterclaims, the Court bears no risk of redoing any matters that it has already decided. Accordingly, under the Supreme Court's own conception of finality and repose, the relevant consideration is not whether the counterclaims for these water rights could have been raised previously, but whether they have been fully and fairly litigated. Thus, it is irrelevant here whether the United States' and Tribe's counterclaims "could have" been raised prior to 1924 or the entry of the 1936 Decree. The counterclaims simply have not been fully and fairly litigated, and as such, the United States and the Tribe are entitled to present their claims in court; they are unaffected by finality and repose as a matter of law.

B. The United States and Tribe are entitled to Summary Judgment on Principal Defendants' Seventh Affirmative Defense because the Tribe is entitled to a *Winters* right to the added lands regardless of whether the lands' purpose can be fulfilled by the Tribe's decreed 26.25 cfs.[34]

Principal Defendants' Seventh Affirmative Defense asserts that federal reserved water rights do not exist if other sources of available water can serve the needs of a reservation. "The United States has failed to allege or show," Defendants contend, "that the water granted to the [United States] in the Walker River Decree is insufficient to meet the primary purposes for which the lands were added to the [Reservation]." Sample WRID Answer at 6–7 (Seventh Affirmative Defense). Under Defendants' theory, to

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[34] Principal Defendants' Seventh Affirmative Defense is entirely without merit. As illustrated in the paragraphs immediately below, consideration of this affirmative defense and Plaintiffs' argument require no factual consideration, and thus Plaintiffs present no statement of necessary undisputed material fact. The United States and Tribe are therefore entitled to a summary judgment on this affirmative defense as a matter of law.

establish the existence of reserved water rights for lands added to the Reservation, Plaintiffs must show, as a matter of fact, that the Tribe's surface right from Walker River decreed in 1940 to serve the lands within the 1924 Reservation boundaries is insufficient to fulfill the purposes for which over 239,000 acres of lands were subsequently added. Relying on *United States v. New Mexico*, Defendants suggest that without such a showing, reserved rights are not "necessary" for the added lands and, therefore, do not exist. This argument misconstrues the Supreme Court's holding in *New Mexico*[35] and runs counter to controlling Ninth Circuit precedent rejecting such a test. Therefore, the argument is incorrect as a matter of law and must be dismissed.

The Court in *New Mexico* did not address Indian water rights whatsoever and certainly did not speak to Defendants' purported rule that an Indian tribe's *Winters* right decreed for the original reservation must be exhausted in order for it to claim and be entitled to reserved water rights for lands subsequently added to the reservation. Rather, the *New Mexico* Court carefully assessed whether several asserted purposes of a national forest were ones for which water rights were impliedly reserved, or whether they were "secondary uses" for which no water right was implied. 438 U.S. at 702. The Court ultimately determined that certain claims (e.g. instream flows for recreation and

[35] Defendants also cite *Cappaert v. United States* for the notion that the Tribe is only entitled to water "minimally necessary" to satisfy the purpose of the reservation. Sample WRID Answer at 6–7 (Seventh Affirmative Defense). Because this concept is similarly encapsulated within *New Mexico*, Plaintiffs do not address *Cappaert* specifically. *See United States v. New Mexico*, 438 U.S. 696, 700 (1978) (Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more.") (citing *Cappaert v. United States*, 426 U.S. 128, 141 (1976)).

aesthetics) fell outside the scope of the forest's "purposes" and thus concluded that they were "secondary uses" for which state-based water rights must be secured. *Id.* at 698, 702. Nothing in the Court's decision questioned or altered the fundamental *Winters* doctrine formulation: that federal reservations impliedly include an allocation of water to fulfill the reservation's purpose. *Winters*, 207 U.S. at 576–77; *New Mexico*, 438 U.S. at 698–99. Indeed, the Court in *New Mexico* proceeded from the premise that water had been impliedly reserved for the Gila National Forest and addressed only the scope of the reserve's implied right. *Id.*

In *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, the Ninth Circuit affirmed this interpretation of *New Mexico* and dismissed an argument nearly identical to the one Defendants raise here. Defendant water associations in that case asserted that the Agua Caliente Tribe's reservation did not impliedly include water rights because available sources, governed by state law, could satisfy the reservation's purpose. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1269 (9th Cir. 2017) (citing *New Mexico*, 438 U.S. at 698, 702, 715). Rejecting this argument, the court reasoned that, in determining the existence of a *Winters* right, "the question is not whether water stemming from a federal right is *necessary* at some selected point in time . . . the question is whether the purpose underlying the reservation *envisions* water use." *Id.* at 1269 (emphasis added) (citing *Winters*, 207 U.S. at 565–76). The court went on to find the land at issue was reserved as a homeland for the tribe, and "water was necessarily implicated in that purpose." *Id.* at

1270. Based on this conclusion alone, the Ninth Circuit held that the United States impliedly reserved water when it created the reservation. *Id.*

Defendants' Seventh Affirmative Defense merely repackages the water associations' failed argument in *Agua Caliente*. Rather than arguing that groundwater already available under state law defeats the existence of a federal reserved water right, Defendants in this case contend that surface water available under the Decree defeats the existence of reserved rights for lands later added to the Reservation. Both arguments rely on a fundamentally flawed interpretation of *New Mexico*: that *Winters* rights attach to reserved lands only if the purpose of those lands cannot be fulfilled by water somehow already available. As the Ninth Circuit found in *Agua Caliente*, the only inquiry the Court must undertake to determine whether a reserved water right exists for the added lands is whether the purpose of those lands generally anticipated water use. The Tribe need not prove that its previously decreed surface water right is insufficient to fulfill that purpose.

In any event, the fundamental purpose in establishing Indian reservations is to provide a permanent homeland capable of supporting a self-sustaining tribal community. The Ninth Circuit has recognized broad "homeland" or multiple purposes when assessing reserved water rights for Indian reservations. *See, e.g.*, *Agua Caliente Band of Cahuilla Indians*, 849 F.3d at 1270 ("Water is inherently tied to the Tribe's ability to live permanently on the reservation. Without water, the underlying purposes – to establish a home and support an agrarian society – would be entirely defeated."); *United States v. Adair*, 723 F.2d 1394, 1408–10 (9th Cir. 1983) (recognizing multiple purposes including agriculture, fishing, hunting, and gathering); *Colville Confederated Tribes v. Walton*, 647

F.2d 42, 47 (9th Cir. 1981) ("The general purpose, to provide a home for the Indians, is a broad one and must be liberally construed.").[36] Indeed, the Ninth Circuit in *Adair* rejected the direct application of *New Mexico's* "primary purpose/secondary use" analysis to Indian reservations: "While the purpose for which the federal government reserves other types of lands may be strictly construed [citing *New Mexico*] . . . the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained." *Adair*, 723 F.2d at 1408 n.13, 1409. The same concepts apply to the Reservation in this case.

The Court will later determine, as a matter of fact, the purposes of the lands added to the Reservation before turning to the question of how much water is necessary to support those purposes. However, it does not need to undertake this analysis now to dismiss Defendants' unsupported reading of *New Mexico*. Because Defendants' Seventh Affirmative Defense is incorrect as a matter of law and requests that the Court engage an

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[36] *See also In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 35 P.3d 68, 75-76 (Ariz. 2001) *("Gila River V")* (courts must broadly construe the purpose of an Indian reservation to "achieve twin goals of Indian self determination and economic self sufficiency"); *State ex rel. Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 219 Mont. 76, 712 P.2d 754, 767–68 (1985) ("the purposes of Indian reserved rights . . . are given broader interpretation in order to further the federal goal of Indian self-sufficiency"); *In re CSRBA Case No. 49576 Subcase No. 91-7755*, 165 Idaho 517, 448 P.3d 322, 346 (2019), *reh'g denied* (Nov. 4, 2019) ("purposes behind the creation of an Indian reservation should be more broadly construed and not limited solely to what may be considered a 'primary' purpose."). The Court in *Agua Caliente* additionally noted that, though *New Mexico* established some useful guidelines, it was not directly applicable to the case at hand. 849 F.3d at 1269 n.6. The court only noted that *New Mexico* may later be relevant in relation to "the question of *how much* water is reserved," and "did not. . . eliminate the threshold issue—that a reserved right exists if the purposes underlying a reservation envision access to water." *Id.* at 1270.

irrelevant factual analysis to determine the existence of a *Winters* right, the United States and Tribe are entitled to summary judgment.

C. The United States and Tribe are entitled to Summary Judgment on Principal Defendants' Twelfth Affirmative Defense because the Tribe is entitled to a groundwater right in addition to its surface water rights.[37]

Principal Defendants' Twelfth Affirmative Defense argues that groundwater rights exist only where surface water rights are insufficient. Sample WRID Answer at 7 (Twelfth Affirmative Defense). In their Response to Plaintiffs' Motion for Judgment on the Pleadings, Defendants expounded that a federal reservation does not have "separate implied reserved water rights, one for surface water and one for groundwater," but that "when lands are reserved, water is only reserved to the extent necessary to accomplish the purpose of the reservation" such that groundwater rights only arise where surface water is insufficient. Defs' Response at 54–55. Not only is this defense reliant on Defendants' inaccurate reading of *New Mexico* discussed *supra*, it also misinterprets clear Ninth Circuit precedent directly pertaining to groundwater rights. Thus, the Court should reject it as well.

In *Agua Caliente*, the Ninth Circuit addressed two distinct questions: (1) whether a federal reserved right exists to groundwater generally under the *Winters* doctrine, and (2)

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[37] Principal Defendants' Twelfth Affirmative Defense is entirely without merit. As illustrated in the paragraphs immediately below, consideration of this affirmative defense and Plaintiffs' argument require no factual consideration, and thus Plaintiffs present no statement of necessary undisputed material fact. The United States and Tribe are therefore entitled to a summary judgment on this affirmative defense as a matter of law.

whether the Agua Caliente Reservation has such a right. *Agua Caliente Band of Cahuilla Indians*, 849 F.3d at 1271. The court held, without qualification, that "the *Winters* doctrine applies to groundwater." *Id.* at 1270. Its primary reasoning was that "*Winters* does not distinguish between surface water and groundwater" and instead focuses on meeting the purposes of the reservation. *Id.* at 1272. And although groundwater was the main source of water for the Agua Caliente Reservation, the court made no suggestion that access to that water was dependent upon a demonstration of need that exceeded the minimally available surface water. In fact, the court acknowledged that a prior state proceeding already recognized surface water rights for the Agua Caliente Reservation, and despite these rights, "some amount" of groundwater was reserved.[38] *Agua Caliente*, therefore, thoroughly undermines Defendants' assertion that groundwater rights are limited by available surface water.

Ultimately, questions concerning the quantity of groundwater to which the Tribe might be entitled involve facts and law that this Court will have to parse further. However, these questions do not bear on whether the Tribe is entitled to groundwater rights in addition to its surface water rights. Defendants' Twelfth Affirmative Defense is incorrect as a matter of law, and the United States and Tribe now are entitled to summary judgment.

[38] The court did not opine as to the amount of Agua Caliente's reserved groundwater right, which was to be quantified in a later phase of the proceeding. *Agua Caliente Band of Cahuilla Indians*, 849 F.3d at 1273.

D. The United States and Tribe are entitled to Summary Judgment on Principal Defendants' Fourteenth Affirmative Defense because the 1936 Act did not preclude the federal government from reserving water for the Tribe when adding land to the Reservation.[39]

Finally, Principal Defendants' Fourteenth Affirmative Defense argues that the 1936 Act authorizing the withdrawal of additional lands for the Reservation "implies . . . that Congress did not intend to exercise its power (implied or otherwise) to reserve water with respect to the lands to be added." Sample WRID Answer at 8 (Fourteenth Affirmative Defense). This, too, is incorrect as a matter of law and, as a result, the United States and Tribe are now entitled to summary judgment.

In essence, this affirmative defense contends that, through the 1936 Act authorizing the Secretary of the Interior to increase the Reservation by up to 171,200 acres, Congress implicitly rejected an implied reservation of water for any duly added lands. The entire basis for Defendants' unusual, reverse implication argument is a *proviso* of the 1936 Act, stating that the withdrawal of land "shall not affect any valid right initiated prior to the approval hereof." Defs' Response at 57–58. Defendants combine that *proviso* with a purported "historic background of Congressional deference to state water law" to conclude that Congress did not intend to reserve water for the added lands. *Id.* Further, Defendants argue that through the *proviso* protecting "valid existing rights,"

[39] Principal Defendants' Fourteenth Affirmative Defense is entirely without merit. As illustrated in the paragraphs immediately below, consideration of this affirmative defense and Plaintiffs' argument require no factual consideration, and thus Plaintiffs present no statement of necessary undisputed material fact. The United States and Tribe are therefore entitled to a summary judgment on this affirmative defense as a matter of law.

Congress deferred to the State of Nevada to regulate water within a federal reservation, equating "valid existing rights" with "valid state law." *Id.*

Defendants' novel affirmative defense lacks direct or express support, and none can be reasonably implied. Moreover, Defendants' argument, if embraced, would upend or eliminate the *Winters* Doctrine. The notion that Congress silently rejected implied water rights has never been embraced by either Congress or any known court. In addition, the argument directly contradicts the positive implication created in *Winters* that water rights are impliedly reserved to support the purposes of a federal reservation.[40] Accordingly, the Court should reject this argument. Even if the Court were to consider the two conceptual bases Defendants allege to support their theory, simple analysis reveals their argument to be without merit.

First, the identified *proviso* in the 1936 Act, that the land withdrawal authorized by the act shall "not affect any valid right," is an unremarkable and plain statutory

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[40] Congress is fully capable of indicating when it does not wish a federal reserve to have waters rights and has done so many times. *See, e.g.*, Colorado Wilderness Act of 1993, Pub. L. No. 103–77, 107 Stat. 756 § (8)(b)(2)(B) (1993) ("Nothing in this Act shall be construed as a creation, recognition, disclaimer, relinquishment, or reduction of any water rights of the United States in the State of Colorado existing before the date of enactment of this Act . . ."); An Act to Provide for the designation and conservation of certain lands in the states of Arizona and Idaho, and for other purposes, Pub. L. No. 100-696, 102 Stat. 4571 § 304 (1988) ("Nothing in this title, nor any action taken pursuant thereto, shall constitute either an expressed or implied reservation of water or water right for any purpose"). In addition, through legislation enacting various Indian water rights settlements, Congress has expressly indicated that federal water rights are not reserved for after-acquired lands. *See, e.g.,* Arizona Water Rights Settlement Act, 118 Stat. 3478, 3523 § 210(b) (2004) ("After-acquired trust land shall not include federally reserved rights to surface water or groundwater.").

statement that *existing* property rights, including water rights, in lands subject to the Act would not be disturbed. This concept fits perfectly with the fundamental principle that *Winters* Rights are reserved from "then unappropriated" waters. *Cappaert*, 426 U.S. at 137. As asserted in the Amended Counterclaims and specified in the Detailed Statement, the water rights the United States and Tribe assert for the lands withdrawn by the 1936 Act will have a priority date "as of the date land was restored or added to the Reservation," specifically September 25, 1936, or June 19, 1972. US Amended Counterclaim at 8, 10; Tribe Amended Counterclaim at 6. Thus, the *Winters* Rights associated with lands added under the 1936 Act and to which Plaintiffs are entitled do not and cannot affect any valid pre-existing water rights. Moreover, the 1936 *proviso* says nothing about post-1936 rights in water or land.

Second, Defendants' argument that general congressional deference to state water law can defeat *Winters* Rights does not withstand even minimal scrutiny. To the contrary, the Supreme Court has expressly held that the *Winters* Doctrine "is a doctrine built on implication and *is an exception* to Congress' explicit deference to state water law in other [statutory] areas." *New Mexico*, 438 U.S. at 715 (emphasis added); *see also id.* at 702 (holding for federal reserved water rights–as distinct from water rights for secondary uses–that "it is reasonable to conclude, *even in the face of Congress' express deference to state water law in other areas*, that the United States intended to reserve the necessary water") (emphasis added); *Agua Caliente Band of Cahuilla Indians*, 849 F.3d at 1269-1270 (similarly rejecting that *New Mexico* stood for the proposition that Congress deferred to state water laws in the context of federal reserved water rights). *Winters*

Rights are not subject to a generalized deference to state water law, whether in Nevada or anywhere else. They are an exception to such deference expressed through *other* federal statutes that are not at issue here.

Thus, Defendants' Fourteenth Affirmative Defense is incorrect as a matter of law, and the United States and Tribe are entitled to summary judgment.

IV. CONCLUSION

As demonstrated above, there are no genuine disputes of material fact in regard to Principal Defendants' Third, Seventh, Twelfth, and Fourteenth Affirmative Defenses. Accordingly, the United States and Tribe jointly and respectfully move the Court for partial summary judgment dismissing those defenses for the reasons set forth herein.

Dated: October 15, 2020

Respectfully submitted,

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Certificate of Service

It is hereby certified that on October 15, 2020 service of the foregoing was made through the court's electronic filing and notice system (CM/ECF) to all of the registered participants.

By */s/ Andrew "Guss" Guarino*
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